

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MHC FINANCING LTD PARTNERSHIP, No C 00-3785 VRW  
et al,

ORDER

Plaintiffs,

v

CITY OF SAN RAFAEL, et al,

Defendants.

\_\_\_\_\_ /

MHC Financing Limited Partnership and Grapeland Vista  
(collectively "MHC") together own the Contempo Marin mobilehome  
park, located in the City of San Rafael. MHC initiated this suit  
on October 13, 2000, alleging the City's rent and vacancy control  
ordinance (Mobilehome Rent Control Ordinance - San Rafael Municipal  
Code, Title 20), which affects the Contempo Marin park, violates  
the takings clause of the Fifth Amendment. Doc #1.

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1 In particular, MHC asserted that the ordinance did not  
2 "substantially advance" a legitimate state interest. Id. In July  
3 2001, the parties entered a settlement agreement, under which the  
4 City agreed to "initiate" amendments to the ordinance that, inter  
5 alia, would eliminate vacancy control. Doc #23, Ex 1, § 2. In  
6 return, MHC would agree to drop the present suit and not challenge  
7 the constitutionality of the amended ordinance. Id. After  
8 encountering strong political opposition, the City declined to  
9 eliminate vacancy control.

10 MHC then amended its complaint to allege, inter alia,  
11 that the City had breached the settlement agreement. Doc #78. In  
12 November 2002, a jury ruled in favor of the City on these claims  
13 (Doc #350), and the court has since declined to disturb that  
14 verdict (Doc #468).

15 The court also tried MHC's other claims at the November  
16 2002, trial but delayed its findings of fact and conclusions of law  
17 pending the Supreme Court's decision in Lingle v Chevron USA, Inc,  
18 125 S Ct 2074 (2005). Doc #412. Lingle eviscerated the  
19 "substantially advances" theory on which MHC's takings claims  
20 rested. Lingle, 12 S Ct at 2074. Accordingly, after Lingle was  
21 decided, defendant-intervenor Contempo Marin Homeowners Association  
22 ("the Association") renewed its motion to dismiss the remaining  
23 claims (Doc #446), and MHC moved to amend its complaint (Doc #450).  
24 On January 27, 2006, the court dismissed certain declaratory relief  
25 claims while permitting MHC to amend its complaint to allege other  
26 theories by which the ordinance violates the Fifth Amendment, and  
27 to add a Fourteenth Amendment substantive due process claim. Doc  
28 #468.

1 In the present second amended complaint (SAC, Doc #472),  
2 MHC alleges the ordinance is an unlawful taking and that it  
3 violates substantive due process. MHC proffers four different  
4 theories for its takings claim, alleging that the City has  
5 performed:

6 (a) a regulatory taking under Penn Central Transportation Co  
7 v New York City, 438 US 104 (1978);

8 (b) a physical taking under Loretto v Teleprompter Manhattan  
9 CATV Corp, 458 US 419 (1982) and Yee v City of Escondido,  
10 503 US 519 (1992);

11 (c) a private taking under Kelo v City of New London, 125 S  
12 Ct 2655 (2005) and Armendariz v Penman, 75 F3d 1311 (9th  
13 Cir 1996) and

14 (d) a land-use exaction under Nollan v California Coastal  
15 Commission, 483 US 825 (1987) and Dolan v City of Tigard,  
16 512 US 374 (1994).

17 SAC. Based on the SAC and the City's opposition, it appears that  
18 MHC is asserting each of these takings theories both facially and  
19 as-applied.

20 After MHC filed the SAC, the City moved to dismiss, or in  
21 the alternative, moved for summary judgment. Doc #475. The City's  
22 motion asserts the following grounds: (1) the takings claims are  
23 barred by res judicata; (2) the takings claims are time-barred by  
24 the statute of limitations; (3) the takings claims are not ripe  
25 pursuant to Williamson County Regional Planning Commission v  
26 Hamilton Bank, 473 US 172, 195 (1985); (4) the substantive due  
27 process claim fails as a matter of law and (5) MHC's Penn Central,  
28 physical takings, private takings and exaction theories are

1 baseless. Doc #475. For reasons discussed below, the court GRANTS  
2 the City's motion for summary judgment on MHC's physical takings  
3 and exaction claims and DENIES summary judgment on all other  
4 claims.

6 I

7 In reviewing a summary judgment motion, the court must  
8 determine whether genuine issues of material fact exist, resolving  
9 any doubt in favor of the party opposing the motion. "[S]ummary  
10 judgment will not lie if the dispute about a material fact is  
11 'genuine,' that is, if the evidence is such that a reasonable jury  
12 could return a verdict for the nonmoving party." Anderson v  
13 Liberty Lobby, 477 US 242, 248 (1986). "Only disputes over facts  
14 that might affect the outcome of the suit under the governing law  
15 will properly preclude the entry of summary judgment." Id. And  
16 the burden of establishing the absence of a genuine issue of  
17 material fact lies with the moving party. Celotex Corp v Catrett,  
18 477 US 317, 322-23 (1986). When the moving party has the burden of  
19 proof on an issue, the party's showing must be sufficient for the  
20 court to hold that no reasonable trier of fact could find other  
21 than for the moving party. Calderone v United States, 799 F2d 254,  
22 258-59 (6th Cir 1986). Summary judgment is granted only if the  
23 moving party is entitled to judgment as a matter of law. FRCP  
24 56(c).

25 The nonmoving party may not simply rely on the pleadings,  
26 however, but must produce significant probative evidence supporting  
27 its claim that a genuine issue of material fact exists. TW Elec  
28 Serv v Pacific Elec Contractors Ass'n, 809 F2d 626, 630 (9th Cir

1 1987). The evidence presented by the nonmoving party "is to be  
2 believed, and all justifiable inferences are to be drawn in his  
3 favor." Anderson, 477 US at 255. "[T]he judge's function is not  
4 himself to weigh the evidence and determine the truth of the matter  
5 but to determine whether there is a genuine issue for trial." *Id*  
6 at 249.

7  
8 II

9 As a preliminary matter, the court confronts MHC's  
10 argument that the City waived its statute of limitations and res  
11 judicata defenses. Doc #479 at 7. In a March 19, 2002, order, the  
12 court determined that the City had breached the settlement  
13 agreement and as a remedy, deemed the City's statute of limitations  
14 and res judicata defenses to be waived. Doc #56 at 13. But after  
15 the City moved to reconsider that decision, the court subsequently  
16 determined that the agreement was ambiguous and that its  
17 interpretation was an issue for further litigation. Doc #99. As  
18 noted earlier, MHC then amended its complaint to allege that the  
19 City had breached the settlement agreement. Doc #78. In November  
20 2002, a jury ruled in favor of the City on these claims (Doc #350),  
21 and in its January 27, 2006, order, the court declined to revisit  
22 the jury's verdict (Doc #468). Because the reasons why the statute  
23 of limitations and res judicata defenses were deemed waived no  
24 longer apply, the court concludes that the City is free to raise  
25 those defenses here.

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A

The court first addresses the three procedural defects asserted by the City, starting with the City's argument that MHC's takings claims are barred by res judicata.

After the City enacted the 1993 amendments, MHC's predecessor-in-interest, De Anza Assets, Inc, filed an action in California state court challenging the ordinance. De Anza Assets, Inc v City of San Rafael, Case No A063017. De Anza alleged that the ordinance as a whole, which included vacancy control, was a regulatory taking. Doc #475 at 6. The state court sustained a demurrer to De Anza's complaint, and on October 6, 1994, the court of appeal upheld the facial constitutionality of the ordinance. Doc #476, Ex 5 at 1415. The court remanded one portion of the case regarding whether De Anza detrimentally relied on the City's procedures under Palcio De Anza v Palm Springs Rent Review Com, 209 CalApp3d 116, 120 (1989) (providing that where a local rent control ordinance sets forth "a specific procedure for establishing rent increases and a landlord relies on those procedures, those enactments create a property right which becomes vested."). This portion of the case was eventually dismissed for failure to prosecute.

28 USC § 1738 requires federal courts to give the same preclusive effect to state court judgments as they would be given by another court of that state. See San Remo Hotel, LP v City & County of San Francisco, 545 US 323, 338 (2005). Once there is a final judgment on the merits in an action, res judicata generally precludes a party or their privies from relitigating issues that were or could have been raised in the previous action. Allen v

1 McCurry, 449 US 90, 94 (1980). To determine the preclusive effect  
2 of a state court judgment federal courts look to state law.  
3 Palomar Mobilehome Park Ass'n v City of San Marcos, 989 F3d 362,  
4 364 (9th Cir 1993).

5 MHC contends that the 1994 state proceedings do not  
6 preclude its current takings claims under the doctrine of res  
7 judicata because (1) there was no final judgment on the merits in  
8 the previous action, (2) MHC is not in privity with the plaintiffs  
9 in the 1993 action and (3) the 1999 ordinance gave rise to new  
10 facial and as-applied claims. Doc #479 at 7. For reasons  
11 discussed below, only the third argument proves convincing.

12 MHC asserts that because the court of appeal partially  
13 reversed and remanded the trial court's order dismissing the case,  
14 there has been no final judgment on the merits for purposes of res  
15 judicata. Doc #479 at 7. But this argument misstates the law.  
16 Although a decision that is reversed on appeal has no preclusive  
17 effect, Ornellas v Oakley, 618 F2d 1351, 1356 (9th Cir 1980), under  
18 California law, a judgment may be split into final and non-final  
19 portions for purposes of res judicata. See Moore v Wood, 36 Cal 2d  
20 621, 629 (1945) ("[T]he doctrine of res judicata applies to those  
21 portions of a judgment which have become final."). Here, the trial  
22 court determined, and the appellate court affirmed, that De Anza  
23 failed to state a claim that the ordinance was unconstitutional.  
24 Under California law, this determination is a final judgment for  
25 purposes of res judicata.

26 MHC also argues that because it did not participate in  
27 the 1993 action, it cannot be considered a privy for purposes of  
28 res judicata. Doc #479 at 8. But this argument relies on an

1 incorrect definition of privity. Under California law, a privy is  
2 an individual who, after judgment, "has acquired an interest in the  
3 subject matter affected by the judgment through or under one of the  
4 parties, as by inheritance, succession, or purchase." Rice v Crow,  
5 81 Cal App 4th 725, 735 (2000) (citing Bernhard v Bank of America  
6 Nat Trust & Savings Ass'n, 19 Cal 2d 807, 811 (1942)). Here, MHC  
7 acquired the mobilehome park from its prior owners in 1994. See  
8 MVL Decl 6(b) 66:26-67:8. Accordingly, as a purchaser of the  
9 property affected by the judgment, MHC is a privy to De Anza under  
10 California res judicata law.

11 MHC next argues that the 1999 ordinance created new  
12 injuries and new claims that could not have been raised in the 1993  
13 action. Doc #479 at 8. Specifically, MHC contends that "[a] new  
14 as-applied claim also accrues each time a home is sold and MHC is  
15 denied market rent, as well as each year when the City enforces the  
16 law \* \* \*." Id. But the Ninth Circuit has expressly rejected this  
17 argument. In De Anza Properties X, Ltd v County of Santa Cruz, 936  
18 F2d 1084 (9th Cir 1991), the court held that an action challenging  
19 a mobilehome rent control ordinance accrued when the ordinance was  
20 enacted and did not accrue anew "each time one of the appellants'  
21 tenants sells a mobilehome to a new tenant and appellants are  
22 precluded from raising the rent." Id at 1087. The court reasoned  
23 that the "action of the local government giving rise to a cause of  
24 action for a taking was the government's enactment of the ordinance  
25 itself" and not the later sale of a mobilehome from one private  
26 party to another. Id.

27 Finally, MHC argues that a new facial claim accrued upon  
28 enactment of the 1999 amendment, citing Levald, Inc v City of Palm

1 Desert, 998 F2d 680, 687 (1993) for the proposition that a facial  
2 claim accrues upon enactment. Doc #479 at 8. MHC notes that the  
3 doctrine of res judicata only bars a cause of action where there is  
4 an identity of claims between the prior and present actions. Id.  
5 MHC asserts that because its claims under the 1999 ordinance do not  
6 arise from the "same nucleus of operative facts," MHC's present  
7 claim is not the same as was previously adjudicated and res  
8 judicata does not bar the instant action. Id. Although the City  
9 also uses the "common nucleus" test in analyzing whether the claims  
10 at issue constitute the same cause of action as those previously  
11 litigated in the state court proceedings, it is evident to the  
12 court that both parties are applying the wrong test.

13 California law differs from both federal law and that of  
14 a majority of states in that its "same cause of action" aspect of  
15 the res judicata doctrine is based not on a transactional analysis  
16 but upon a primary rights theory. Manufactured Home Communities,  
17 Inc v City of San Jose, 420 F3d 1022, 1031 (9th Cir 2005). Under  
18 the primary rights theory, a cause of action consists of (1) a  
19 primary right possessed by the plaintiff, (2) a corresponding  
20 primary duty on the defendant and (3) a wrongful act done by the  
21 defendant constituting a breach of that duty. Agarwal v Johnson,  
22 25 Cal 3d 932, 954-55 (1979). The primary right is the plaintiff's  
23 right to be free of the injury suffered. Alpha Mechanical, Heating  
24 & Air Conditioning, Inc, v Traveler Cas & Sur Cor of America, 133  
25 Cal App 4th 1319, 1327 (2005). This right is distinguished from  
26 both the theory of liability on which the injury is premised and  
27 the remedy sought. If an action involves "the same injury to the  
28 plaintiff and the same wrong by the defendant then the same primary

1 right is at stake even if in the second suit the plaintiff pleads  
2 different theories of recovery, seeks different forms of relief  
3 and/or adds new facts supporting recovery." Eichman v Fotomat  
4 Corp, 147 Cal App 3d 1170, 1174 (1983); see also Mycogen Corp v  
5 Monsanto Co, 28 Cal 4th 888, 897 (2002) (concluding that different  
6 theories of recovery are not separate primary rights); Slater v  
7 Blackwood, 15 Cal 3d 791, 795 (1975) (even where there are multiple  
8 legal theories upon which recovery might be predicated, one injury  
9 gives rise to only one claim for relief).

10 The City argues that MHC v City of San Jose compels  
11 preclusion in the instant action. Doc #479 at 8. In City of San  
12 Jose, the Ninth Circuit concluded that res judicata barred  
13 plaintiffs' second suit challenging a rent control ordinance  
14 because both cases involved a single primary right, namely, "the  
15 right [for plaintiffs] to receive a fair return on its investment  
16 at [its mobilehome park]." 420 F3d at 1031. The lone material  
17 difference between MHC's instant action and the suit in City of San  
18 Jose is that the present suit attacks an amended ordinance.  
19 Accordingly, the essential issue is whether the amendment created a  
20 new injury so that the current suit implicates a different primary  
21 right from the one involved in the 1994 action.

22 The rent control ordinance at issue was initially enacted  
23 in 1989 and the City amended the ordinance in 1993 to include  
24 vacancy control. Like the original ordinance, the 1993 amended  
25 ordinance set annual automatic rent increases on a graduated  
26 percentage of the consumer price index: 100% of CPI where CPI was  
27 5% or less, 75% of CPI (but no less than 5%) where CPI was between  
28 5 and 10% and 66% of CPI where CPI exceeded 10%. Doc #476, Ex 2.

1 In 1999, the City modified this automatic increase, changing from a  
2 sliding scale to a flat 75% of CPI. Id, Ex 3.

3 This amendment severs preclusion under res judicata  
4 because it substantively changed the ordinance, and these changes  
5 bear on MHC's underlying claims. Namely, by imposing a flat 75%  
6 CPI adjustment, the 1999 amendment allegedly compels an  
7 exponentially expanding gap between permitted rental income and  
8 fair market rent for the land. The 1999 ordinance also prevents  
9 MHC from including capital improvements in the amount of the base  
10 rent. As a result, even if MHC must invest capital to improve and  
11 maintain the park, the ordinance prohibits MHC from gaining a  
12 return on such investment. Hence, the present action does not  
13 implicate the same primary right as that in the De Anza  
14 proceedings; rather, it involves a different injury to MHC and a  
15 different wrong by the City. Further, these differences affect  
16 MHC's takings and substantive due process claims. Accordingly, the  
17 court declines to preclude MHC's claims on grounds of res judicata.

18  
19 B

20 The court turns to the City's contention that MHC's  
21 takings claims are time-barred.

22 The applicable statute of limitations in this case is one  
23 year (for § 1983 suits in California). The City asserts that MHC's  
24 suit is time-barred because vacancy control was added in the 1993  
25 amendments. Doc #475 at 12. MHC argues, as it did for res  
26 judicata purposes, that new as-applied claims accrued upon the sale  
27 of each home and annual enforcement of the ordinance, and a new  
28 facial cause of action arose when the 1999 ordinance was enacted.

1 Doc #479 at 9.

2           The City cites De Anza Properties X, Ltd v County of  
3 Santa Cruz, 936 F2d 1084, 1086-87 (9th Cir 1991), in support of its  
4 contention that MHC's claims are time-barred. In De Anza, the  
5 plaintiffs attempted to circumvent the statute of limitations bar  
6 by arguing their cause of action did not accrue until the county  
7 amended the ordinance to remove the sunset provision contained in  
8 the original ordinance. Id at 1086. The Ninth Circuit rejected  
9 this argument, finding that "the reenactment of the rent control  
10 ordinance \* \* \* did not substantively change its impact upon  
11 [plaintiffs]." Id at 1086. The court reasoned that because the  
12 change "related to duration," it only "affect[ed] damages," not the  
13 underlying claim. Id.

14           The City's reliance on De Anza is misplaced. Unlike the  
15 amended ordinance in De Anza, which merely extended the time on an  
16 existing ordinance, the 1999 amendment substantively changed the  
17 law, adding statutory elements and inflicting new economic  
18 injuries. The court De Anza emphasized this very distinction: it  
19 rejected accrual of new claims because "the effect of the ordinance  
20 upon plaintiffs has not altered." 936 F2d at 1086. Without De  
21 Anza's limitation, the City could sequentially amend its ordinance,  
22 eventually reducing the CPI adjustment to zero, and each ordinance  
23 would be insulated from judicial review by the statute of  
24 limitations. Hence, for purposes of the statute of limitations,  
25 when a statute is substantively amended, as here, constitutional  
26 attack need only comply with the date of amendment, not the  
27 original date of enactment. Accordingly, MHC's takings claims are  
28 not time-barred.

C

The City's final asserted procedural defect is that MHC's takings claims are not ripe.

The ripeness inquiry in the regulatory takings context turns on two considerations: (1) whether plaintiff obtained a final decision from the governmental authority charged with implementing the regulations and (2) whether plaintiff pursued compensation through state remedies unless doing so would be futile. See Williamson County v Hamilton Bank, 473 US 172, 194-95 (1982).

Before analyzing the two-prong test of Williamson County, the court notes that the first prong only applies to MHC's as-applied claims; the facial claims do not require a final decision because, by definition, they "derive from the ordinance's enactment, not any implementing action on the part of governmental authorities." Ventura Mobilehome Communities v City of San Buenaventura, 371 F3d 1046, 1052 (9th Cir 2004). The state remedies prong, however, applies to MHC's facial and as-applied takings claims.

MHC asserts its as-applied takings claims satisfy the first Williamson prong on three grounds: (1) no further City action is necessary to ascertain how the ordinance affects MHC's property; (2) the City made a decision to deny MHC discretionary rent increases; and (3) the City declined to vary the ordinance pursuant to the settlement agreement.

In response, the City asserts that MHC has not sought a final adjudication from the City Council because it has never requested a discretionary rent increase since the 1999 amendment.

1 See MHC v San Jose, 420 F3d at 1036 (MHC's challenge to homeowner  
2 exemption is not ripe where MHC did not follow administrative  
3 process); Ventura Mobilehome Communities Owners Ass'n, 371 F3d at  
4 1053 (as-applied challenge not ripe where parkowner did not allege  
5 a request for additional rent increase under the challenged  
6 ordinance).

7           According to MHC, the first Williamson prong does not  
8 require it to file for a discretionary rent increase; rather, all  
9 that is required is that a landowner provide the City "the  
10 opportunity to grant any variances or waivers allowed by law."  
11 Carson Harbor Villages, Ltd v City of Carson, 353 F3d 824, 826-27  
12 (9th Cir 2004). MHC's argument would not suffice but for the  
13 peculiar facts in this case. Unlike the several cases cited by  
14 both parties concerning the ripeness of challenges to mobilehome  
15 rent control ordinances, here the parties entered into a settlement  
16 agreement, under which the City agreed to "initiate" amendments to  
17 the ordinance that, inter alia, would eliminate vacancy control.  
18 Doc #23, Ex 1, § 2. In return, MHC would agree to drop the present  
19 suit and not challenge the constitutionality of the amended  
20 ordinance. *Id.* This settlement triggered strong political  
21 opposition, to which the City acquiesced. As a result, the City  
22 formally declined to eliminate vacancy control. Through this  
23 exchange, MHC obtained a final decision from the City  
24 notwithstanding MHC's failure to request a discretionary rent  
25 increase after 1999.

26           Moreover, while a landowner must give a land-use  
27 authority an opportunity to exercise its discretion, "once it  
28 becomes clear that \* \* \* the permissible uses of the property are

1 known to a reasonable degree of certainty, a takings claim is  
2 likely to have ripened." Palazzolo v Rhode Island, 533 US 606, 620  
3 (2001). In Palazzolo, because it was clear the state agency would  
4 bar construction on the petitioner's wetland, the Court found the  
5 case ripe for review despite the petitioner's failure to apply for  
6 development of the particular residential subdivision. *Id.*  
7 Similarly, here, the restrictions imposed by the City's ordinance  
8 are sufficiently certain. The City's conduct throughout the  
9 dispute makes plain it intends to continue subjecting MHC to the  
10 ordinance, a fact reinforced by City's unwillingness to eliminate  
11 vacancy control pursuant to the parties' settlement agreement in  
12 2002.

13           Turning to the second prong of Williamson County -  
14 whether MHC pursued compensation through state remedies unless  
15 doing so would be futile - MHC contends it has alleged sufficient  
16 facts for four reasons: (1) exhaustion is prudential and not  
17 jurisdictional; (2) exhaustion does not apply to injunctive or  
18 declaratory relief; (3) MHC exhausted state remedies through  
19 litigation of state law claims and (4) further exhaustion is  
20 futile.

21           That exhaustion is prudential rather than jurisdictional  
22 is of little consequence as it does not mean the court should  
23 exercise its prudential discretion to forego exhaustion here. See  
24 Suitam v Tahoe Regional Planning Agency, 520 US 725 (1997). And in  
25 any event, MHC has not identified - and the court has not found -  
26 any cases in which a court declined to apply the Williamson County  
27 test due to its prudential character.

28 //

1           Second, MHC contends that exhaustion does not apply to  
2 its claims for injunctive or declaratory relief. In response, the  
3 City argues that compensation is the only remedy available for a  
4 Penn Central or physical taking and, alternatively, that  
5 unexhausted claims for injunctive and declaratory relief are not  
6 ripe. Although the City correctly notes that MHC cannot circumvent  
7 Williamson County by alleging only injunctive and declaratory  
8 relief, see MHC v City of San Jose, 358 F Supp 2d 896 (ND Cal  
9 2003), affd 420 F3d 1022 (9th Cir 2005), its assertion that  
10 compensation is the only remedy for a Penn Central or physical  
11 taking claim is mistaken, and requires the court's clarification.  
12 The City reads Daniel v County of Santa Barbara, 288 F3d 375 (9th  
13 Cir 2002), as flatly preventing injunctive relief for regulatory  
14 takings. Doc #482 at 8. But that case did not sweep so broadly.  
15 The case concerned a plaintiff who sought exemption from the  
16 Williamson County ripeness test for his injunctive relief claims,  
17 as MHC does here. Hence, the court dismissed the injunctive relief  
18 prayer but did so because plaintiff failed to exhaust state  
19 remedies not because injunctive relief is never available for a  
20 regulatory taking.

21           The City also points to the text of the Fifth Amendment  
22 to advance its contention that injunctive relief is unavailable,  
23 noting that the text does not proscribe the taking of property; it  
24 proscribes government taking without just compensation. But the  
25 "just compensation" component of the Fifth Amendment does not bar  
26 injunctive relief outright; it only bars such relief if the  
27 government is willing and able to pay just compensation. In any  
28 event, the court agrees with the City that MHC cannot circumvent

1 Williamson County merely because it seeks injunctive and  
2 declaratory relief.

3 Third, MHC claims that it exhausted state remedies via an  
4 October 1996 petition to the City for a \$18.37 per month capital  
5 expense pass through under the terms of the ordinance. Although  
6 MHC subsequently settled this proceeding with the tenants of the  
7 park, a later dispute over the terms of the settlement led MHC to  
8 counterclaim against the City in state court for inverse  
9 condemnation. MHC's claim for inverse condemnation asserted that  
10 MHC was denied "just compensation" through the City's conduct.  
11 City's RJR, Ex 9, ¶ 32. A demurrer was sustained to this claim,  
12 which was affirmed on appeal. Id, Ex 10. The City points out that  
13 MHC's complaint lacked specificity, i e, it did not make any  
14 request based on its rate of return, the effect of rent control,  
15 the effect of vacancy control or the effect of the CPI adjustment.  
16 Doc #475 at 7. But the failure to explicate each possible theory  
17 of compensation does not render MHC's inverse condemnation claim  
18 inadequate. In Ventura, for example, the Ninth Circuit listed  
19 various statutory avenues for exhausting available state court  
20 remedies, including, as here, a rent adjustment based on capital  
21 improvements. 371 F3d at 1053. Hence, through this state inverse  
22 condemnation claim, MHC pursued compensation via state remedies in  
23 satisfaction of the second prong of the Williamson County test.

24 In sum, ripeness doctrine does not require a landowner  
25 "to submit applications for their own sake"; rather, it imposes  
26 obligations because "[a] court cannot determine whether a  
27 regulation goes 'too far' unless it knows how far the regulation  
28 goes." Palazzolo, 533 US at 620; MacDonald, 477 US at 348. Having

1 sued the City under state law in state and federal proceedings over  
2 the course of 14 years, MHC has made clear the scope of the City's  
3 ordinance. Accordingly, MHC's takings claims are ripe.

4  
5 III

6 MHC's latest complaint includes a substantive due process  
7 challenge to the ordinance. The City contends this claim runs  
8 afoul of Ninth Circuit case law preventing substantive due process  
9 challenges based on deprivations of property and also fails because  
10 mobilehome rent and vacancy control is rational as a matter of law.

11 MHC's claim principally derives from Justice Kennedy's  
12 concurrence in Lingle, which states in part, "[t]his separate  
13 writing is to note that today's decision does not foreclose the  
14 possibility that a regulation might be so arbitrary or irrational  
15 as to violate due process." Lingle, 125 S Ct at 2087 (Kennedy, J,  
16 concurring). The City counters that the majority never reached  
17 this issue and that a concurrence of one cannot sub silentio  
18 overturn long-standing Ninth Circuit precedent indicating that a  
19 deprivation of property cannot be challenged via substantive due  
20 process. Armendariz v Penman, 75 F3d 1311 (9th Cir 1996); Ventura,  
21 371 F3d at 1054; see also Crown Point Development v City of Sun  
22 Valley, 2006 WL 288392 at \*2 (D Idaho Feb 6, 2006) ("this Court  
23 applies the current Ninth Circuit law and finds the complaint  
24 should be dismissed as the law of this circuit does not allow  
25 substantive due process claims \* \* \* when the interest at stake is  
26 real property.").

27 Yet, in addition to Justice Kennedy's concurrence, the  
28 majority opinion in Lingle plainly suggests the availability of a

1 substantive due process challenge to a regulatory taking. See  
2 Lingle, 125 S Ct at 2083 ("We conclude that [the substantially  
3 advances] formula prescribes an inquiry in the nature of a due  
4 process, not a takings test"). See also *id* (noting that "probing  
5 the regulation's underlying validity" is "logically prior to and  
6 distinct from the question whether a regulation effects a taking,  
7 for the Takings Clause presupposes that the government has acted in  
8 pursuit of a valid public purpose").

9 More significantly, Lingle undercuts the Ninth Circuit's  
10 basis for barring substantive due process challenges to  
11 deprivations of property. The reason for this bar was that claims  
12 should rely on the explicit textual sources of constitutional  
13 protection, if available, such as the takings clause, rather than  
14 "the more generalized notion of substantive due process."  
15 Armendariz, 75 F3d at 1324. But Lingle held that challenges  
16 concerning the means-ends relationship of a statute do not  
17 implicate the takings clause. 125 S Ct at 2083. Hence, after  
18 Lingle, there is no explicit text for assessing whether a  
19 regulation is effective in achieving a legitimate public purpose;  
20 only the due process clause remains. See also Blaesser &  
21 Weinstein, *Federal Land Use Law & Litigation* § 2:11 (noting that,  
22 after Lingle, "[i]f a land use regulation furthers no public  
23 purpose whatsoever then, although just compensation is no longer  
24 available under the Fifth Amendment, the failure of the regulation  
25 to substantially advance any legitimate public purpose in violation  
26 of due process \* \* \* would give rise to a cause of action for  
27 damages under 42 USC § 1983"). Accordingly, the court concludes  
28 that after Lingle, Armendariz and its progeny no longer preclude a

1 substantive due process challenge to deprivations of property.

2           The City contends that MHC's substantive due process  
3 challenge also fails because the ordinance is rational as a matter  
4 of law. The City notes that rent control is pervasive and  
5 "legislative determinations about the efficacy of economic  
6 legislation cannot be second-guessed by the court." Doc #475 at 10  
7 (citing Kelo v City of New London, 125 S Ct 2655, 2661 (2005);  
8 Lingle, 125 S Ct at 2085).

9           But the premium the City's ordinance confers to tenants  
10 differs in kind from the effects of ordinary apartment rent  
11 control. Apartment tenants typically do not sell the occupancy  
12 interest in the apartment to their successors; hence, traditional  
13 rent control transfers wealth from landlords to the incumbent  
14 tenants and all future tenants. By contrast, the City's ordinance  
15 effects a one-time transfer of wealth to the incumbent mobilehome  
16 owners, who retain the premium when they sell their mobilehome at  
17 supracompetitive prices. The subsequent mobilehome owner obtains  
18 none of the benefits of the City's ordinance. According to the  
19 Supreme Court, this distinction "may shed some light on whether  
20 there is a sufficient nexus between the effect of the ordinance and  
21 the objectives it is supposed to advance." Yee v City of  
22 Escondido, 503 US 519, 530 (1991). Additionally, several Ninth  
23 Circuit cases question the propriety of rent control ordinances  
24 that effect a premium transfer to incumbent tenants. See e g,  
25 Richardson v City & County of Honolulu, 124 F3d 1150 (9th Cir 1997)  
26 ("[The ordinance] regulates the use of the lessors' property  
27 interests in a manner that does not substantially further the goal  
28 of creating affordable housing" due to "[t]he absence of a

1 mechanism that prevents lessees from capturing the net present  
2 value of the reduced land rent in the form of a premium").

3 That Lingle has shifted the judicial assessment of  
4 effectiveness from takings law to the realm of substantive due  
5 process does not erase the significance of repeated judicial  
6 skepticism of these premium-transfer rent control ordinances. To  
7 the contrary, the reasoning developed under the now-defunct  
8 "substantially advances" formula plainly bears on MHC's due process  
9 challenge, as both doctrines, in essence, assess the relationship  
10 between the City's means and ends.

11 Regarding the ordinance here, the City's argument fails  
12 to assuage the court's concerns. Rather than defend the ordinance  
13 on its merits, the City simply points out the existence of other  
14 mobilehome rent control ordinances, which are said to "establish"  
15 the ordinance's rationality, "even if economists disagree." Doc  
16 #475 at 2. But following others does not ensure a sensible path,  
17 especially given the City's adamant effort to shield its ordinance  
18 from judicial scrutiny. The court therefore declines to adopt the  
19 City's argument, as to do so would insulate even the most arbitrary  
20 law from judicial review for the mere reason that two or more  
21 cities were obtuse enough to enact it. Affordable housing may be a  
22 reasonable end. But the City fails on the present record to  
23 persuade that the ordinance's one-time premium transfer as a means  
24 of achieving that end cannot be analyzed for its rationality.  
25 Accordingly, the court denies the City's motion for summary  
26 judgment on MHC's substantive due process claim.

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## IV

Finally, the City's summary judgment motion argues that MHC's Penn Central, physical takings, private takings and exaction theories are baseless. For the following reasons, the court grants the City's motion on MHC's physical takings and exaction claim and denies the City's motion on MHC's Penn Central and private takings claim.

## A

MHC argues that the ordinance "goes too far [and should] be recognized as a taking." Pennsylvania Coal Co Mahon, 260 US 393, 415 (1922). In Penn Central v New York City, 438 US 104 (1978), the Court set forth factors for evaluating whether a regulation "goes too far":

Primary among those factors are "the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." In addition, the "character of the governmental action" -- for instance whether it amounts to a physical invasion or instead merely affects property interests through "some public program adjusting the benefits and burdens of economic life to promote the common good" -- may be relevant in discerning whether a taking has occurred.

Lingle, 125 S Ct at 2081-82 (citing Penn Central, 438 US at 124). Courts almost universally describe the ad hoc review mandated by Penn Central as involving a three-factor test, assessing the economic impact, the property owner's reasonable investment-backed expectations and the character of the government action. Moreover, this test is "informed" by the purpose of the takings clause, which is to prevent the government from "forcing some people alone to bear public burdens which, in all fairness and justice, should be

borne by the public as a whole." Palazzolo v Rhode Island, 533 US 606, 618 (2001) (quoting Armstrong v United States, 364 US 40, 49 (1960)).

The first Penn Central factor, the ordinance's economic impact on MHC, generally assesses "whether the interference with the \* \* \* property is of such a magnitude that 'there must be an exercise of eminent domain and compensation to sustain [it].'" 438 US at 136 (quoting Pennsylvania Coal, 260 US at 413). In this inquiry a comparison of the value of affected property before and after a regulatory action is relevant and probably essential; but such a comparison, according to the Supreme Court, is by no means conclusive. Keystone Bituminous Coal Assn v De Benedictis 480 US 490 (1987). Moreover, the Supreme Court has measured economic effect in several different ways. See Hodel v Irving, 481 US 704, 714 (1987) (looking to the market value of the property); Keystone, 480 US at 493-96 (1987) (looking to whether the regulation makes the property owner's business operation "commercially impracticable"); Andrus v Allard, 444 US 51, 66 (1979) (looking to the possibility of other economic uses besides sale, which was prohibited by the challenged regulation).

According to the City, that Contempo Marin is currently worth more than MHC's purchase price is dispositive. The court disagrees. As discussed below, within the context of Penn Central's second factor, the Supreme Court flatly rejected this argument. Because land prices generally rise, especially in California, the post-enactment transfer of title would effectively foreclose any takings challenge. It would, as the Supreme Court warned, "put an expiration date on the Takings Clause." Palazzolo,

1 533 US at 633-36. Further, MHC proffers sufficient evidence to  
2 survive the City's summary judgment motion. In particular, MHC  
3 convincingly asserts that the ordinance's flat 75% CPI adjustment  
4 creates an exponentially expanding gap between permitted rental  
5 income and fair market rent for the land. Doc #479 at 17-23. In  
6 any event, this Penn Central factor implicates complicated factual  
7 issues inappropriate for the court to resolve on summary judgment.

8         Next, the court turns to the second regulatory takings  
9 factor under Penn Central – the extent to which the challenged  
10 regulation interferes with the private property owner's distinct  
11 investment-backed expectations. The Supreme Court has indicated in  
12 Ruckelshaus v Monsanto Co that such expectations must be reasonable  
13 and that failure to prove this second factor can defeat a takings  
14 claim. 467 US 986, 1005-06 (1984). The City emphasizes that MHC  
15 knew about the ordinance prior to purchase and notes "the windfall  
16 profit [MHC] would receive from purchasing a rent controlled  
17 property at a rent controlled price and then eliminating rent  
18 control." Doc #475 at 23.

19         Although regulatory notice may be a factor in assessing  
20 whether the landowner's distinct investment-backed expectations are  
21 reasonable, it is by no means determinative. In Palazzolo, the  
22 Supreme Court rejected a categorical notice rule because it would  
23 bestow unlimited power to the states unilaterally to define which  
24 property rights would receive constitutional protection.

25         Were we to accept the State's [notice] rule, the  
26 postenactment transfer of title would absolve the State  
27 of its obligation to defend any action restricting land  
28 use, no matter how extreme or unreasonable. A State  
would be allowed, in effect, to put an expiration date  
on the Takings Clause.

1           Hence, although relevant, notice of the ordinance does  
2 not foreclose MHC's Penn Central claim. Of equal importance is  
3 "the nature and extent of permitted development under the  
4 regulatory regime vis-a-vis the development sought by the  
5 claimant." Palazzolo, 533 US at 633-36 (O'Connor, J, concurring).  
6 This factor presumably depends on whether the owner seeks to engage  
7 in a use of land that is comparable to that which has been  
8 permitted to neighboring landowners. Compare Lucas, 505 US at 1031  
9 ("The fact that a particular use has been engaged by similarly  
10 situated owners ordinarily imports a lack of any common law  
11 prohibition"). That is, a landowner has a reasonable expectation  
12 to use property in the same manner as similarly situated  
13 landowners. Whether the ordinance interferes with reasonable  
14 investment-backed expectations therefore also depends on several  
15 unresolved factual issues.

16           The final Penn Central factor – the character of the  
17 government action – does not unambiguously weigh in the City's  
18 favor either. The Penn Central court did not define the  
19 "character" factor except to mention it may depend on whether the  
20 regulation amounts to a physical invasion. Courts now inquire  
21 whether the regulation functions "like" a physical invasion after  
22 Loretto v Teleprompter Manhattan CATV Corp, 458 US at 426, in which  
23 the Court affirmed that a physical invasion is always a taking.  
24 This factor also depends on whether the property owner has been  
25 "singled out" to bear a public burden, perhaps due to bad faith on  
26 the part of the government, or has been called upon to provide a  
27 public benefit rather than to avoid injury to other persons. See E  
28 Enters v Apfel, 524 US 498, 537 (1998) (plurality opinion) (finding

1 that the "character" factor weighed in favor of a taking because  
2 the government had singled out the property to bear the substantial  
3 burden of funding federally-mandated retirement benefits to coal  
4 miners); Del Monte Dunes, 526 US at 722-23 (upholding a jury's  
5 finding of a taking whether the City rejected five successive  
6 development plats, each one reduced to correspond to a new  
7 government concern, for various, inconsistent reasons).

8         The City urges the court to resolve this factor in its  
9 favor on the basis that MHC has not been "singled out"; rather, the  
10 ordinance applies to both mobilehome parks in San Rafael. Doc #475  
11 at 24. But the court declines to interpret the "singled out" test  
12 so narrowly. That the City has chosen two property owners to bear  
13 the burden of providing allegedly affordable housing does not  
14 prevent this factor from weighing in MHC's favor. Further, this  
15 evidence fails to demonstrate the City's good faith in dealing with  
16 MHC, especially in light of the City's failure to abide by the  
17 parties' settlement agreement. Hence, this factor, like the  
18 others, cannot be resolved on the present record.

19         In sum, for cases involving partial regulatory takings  
20 like the instant action, courts have "generally eschewed" any set  
21 formula for determining how far is too far, choosing instead to  
22 engage in an "essentially ad hoc factual inquir[y]." Tahoe-Sierra  
23 Preservation Council, Inc, v Tahoe Regional Planning Agency, 535 US  
24 302, 326 (2002). Due to the innumerable factual questions entailed  
25 in this inquiry, the court declines to resolve MHC's Penn Central  
26 claim at the summary judgment stage. Accordingly, the court denies  
27 the City's for summary judgment motion.

28 //

B

MHC also asserts that the City's zoning of Contempo Marin creates a physical taking because the zoning requires MHC to continue using Contempo Marin as a mobilehome park. Yee v City of Escondido, 503 US 519, 528 (1992) (A physical takings case may "be presented were [a] statute, on its face or as applied, to compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy.").

The City argues that a physical takings claim is not appropriate in this context because MHC is not required to submit to the physical occupation of the land. Doc #475 at 17-181; Yee, 503 US at 527-28 ("The government effects a physical taking only where it requires the landowner to submit to the physical occupation of his land.").

According to MHC, the City's zoning laws mandate physical occupation because they cannot be changed, i e, it would be futile for MHC to attempt to alter them. In particular, MHC asks the court to "infer from rejection of [the settlement agreement] that the City would reject closure of the park." Doc #479 at 23. Yet the court already declined to infer futility when it determined that MHC could not seek declaratory relief for a right to change the use of the park. Doc #468 at 24. Because MHC had never attempted to change the zoning rules under state law, the court concluded that declaratory relief would force the court to "speculat[e] as to future events." Id. That reasoning applies here as well. The court cannot conclude the City's zoning laws require MHC to submit to the physical occupation of its land without speculating whether the City would permit modification

1 under state law. Should, of course, MHC seek to change the use of  
2 the land on which Contempo Marin stands and be refused permission  
3 to do so and compensation, a physical taking claim may well be an  
4 appropriate remedy. But that is not the case now before the court.  
5 Accordingly, the court grants the City's motion for summary  
6 judgment on MHC's physical takings claim.

7  
8 C

9 MHC also argues that the ordinance conferred a private  
10 benefit on identifiable individuals – namely, the tenants of  
11 Contempo Marin at the time the ordinance and its amendments were  
12 passed – and thus violated the public use restriction of the Fifth  
13 Amendment. See Kelo v City of New London, 125 US 2655, 2661 (“Nor  
14 would [defendant] be allowed to take property under the mere  
15 pretext of a public purpose, when its actual purpose was to bestow  
16 a private benefit.”); Hawaii Housing Authority v Midkiff, 467 US  
17 229, 245 (1984) (“A purely private taking could not withstand the  
18 scrutiny of the public use requirement; it would serve no  
19 legitimate purpose of government and would thus be void.”); Calder  
20 v Bull, 3 US 386, 388 (1798) (noting that legislation is invalid if  
21 it “takes property from A and gives it to B”). Considering whether  
22 government action meets the public use requirement “is logically  
23 prior to and distinct from the question whether a regulation  
24 effects a taking, for the Takings Clause presupposes that the  
25 government has acted in pursuit of a valid public purpose.”  
26 Lingle, 125 S Ct 2074, 2084.

27 Under the takings clause of the Fifth Amendment, a state  
28 may transfer property from one private party to another if future

1 "use by the public" is the purpose of the taking. Kelo, 125 S Ct  
2 at 2661. This claim therefore turns on whether the City's  
3 ordinance serves a "public purpose" – a concept the Supreme Court  
4 has defined broadly. For example, in Hawaii Housing Authority v  
5 Midkiff, 467 US 229 (1984), the Supreme Court upheld a statute  
6 whereby fee title was taken from lessors and transferred to lessees  
7 in order to break up a land oligopoly. Id at 241-42. The Supreme  
8 Court unanimously rejected the landowners' arguments that the  
9 statute violated the public use requirement of the takings clause,  
10 concluding that "[t]he 'public use' requirement \* \* \* is  
11 coterminous with the scope of a sovereign's police powers." Id at  
12 240.

13 The ordinance's purpose in the present action – providing  
14 affordable housing – is a public purpose. MHC disputes, however,  
15 whether the City's ordinance achieves such a purpose. But under  
16 the standards set out in Mitkiff and Kelo, courts defer to  
17 legislative judgments of this kind: the court must accept the  
18 public purpose of the ordinance unless the City's findings are  
19 "palpably without reasonable foundation." Midkiff, 467 US at 241.

20 Despite the deference to a legislature's determination  
21 compelled by Kelo and Mitkiff, the Supreme Court maintains that  
22 "[a] City would no doubt be forbidden from taking petitioners' land  
23 for the purpose of conferring a private benefit on a particular  
24 private party. \* \* \* Nor would the City be allowed to take  
25 property under the mere pretext of a public purpose, when its  
26 actual purpose was to bestow a private benefit" Kelo, 125 S Ct at  
27 2661. In Kelo, the City of New London offered a "carefully  
28 considered development plan," which particularly described how the

1 regulation would "revitalize the local economy by creating  
2 temporary and permanent jobs, generating a significant increase in  
3 tax revenue, encouraging spin-off economic activities and  
4 maximizing public access to the waterfront." Id at 2663 & n6.  
5 Whereas here, the City proffers no such evidence, thereby inviting  
6 the court's inference that the ordinance simply confers a private  
7 benefit on the incumbent tenants.

8           Moreover, in his concurrence, Justice Kennedy – the  
9 deciding vote in Kelo – further clarifies that judicial deference  
10 regarding the public use clause has limits:

11           A court applying rational-basis review under the *Public*  
12 *Use Clause* should strike down a taking that, by a clear  
13 showing, is intended to favor a particular private  
14 party, with only incidental or pretextual public  
15 benefits \* \* \* \* A court confronted with a plausible  
16 accusation of impermissible favoritism to private  
17 parties should treat the objection as a serious one and  
18 review the record to see if it has merit. Kelo, 125 S  
19 Ct at 2669.

20           The trial court in Kelo satisfied Justice Kennedy's  
21 standard through "careful and extensive inquiry into whether, in  
22 fact, the development plan is of primary benefit to the developer \*  
23 \* \* [and] only incidental benefit to the City." Id. Such an  
24 inquiry will likewise be necessary in the present action.  
25 Accordingly, the court denies the City's motion for summary  
26 judgment on MHC's private takings claim.

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28           D

29           MHC also contends that the ordinance constitutes a land-  
30 use exaction under Nollan/Dolan. See Nollan v California Coastal  
Commission, 483 US 825 (1987) (finding a taking when there was no

1 "essential nexus" between a legitimate state interest and a public  
2 easement exacted for a building permit); Dolan v City of Tigard,  
3 512 US 374, 391 (1994) (finding a taking when a required public  
4 dedication lacks "rough proportionality" to a proposed  
5 development).

6           This claim fails because the ordinance cannot be  
7 construed as a land-use exaction without upending takings law. In  
8 City of Monterey v Del Monte Dunes, the Supreme Court restricted  
9 the scope of the Nollan/Dolan rule: "we have not extended the  
10 rough-proportionality test of Dolan beyond the special context of  
11 exactions – land-use decisions conditioning approval of development  
12 on the dedication of property to public use." 526 US 687, 702  
13 (1999). MHC argues the ordinance constitutes an exaction on the  
14 theory that it conditions MHC's use of the land subject to  
15 perpetual rent control. The court rejects this novel theory.  
16 Every land-use regulation subjects the property-owner's use to a  
17 limitation of some kind. To characterize these regulations as  
18 exactions would flatly undermine Lingle's rejection of the  
19 "substantially advances" test within takings law, especially  
20 considering Lingle itself concerned a rent-control statute. MHC  
21 has not sought to develop property in San Rafael; hence, no land-  
22 use exaction has occurred. See Del Monte Dunes, 526 US at 702  
23 (1999) (defining "exactions" as "land-use decisions conditioning  
24 approval of development on the dedication of property to public  
25 use."). Accordingly, the City's motion for summary judgment on  
26 MHC's exaction claim is granted.

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V

Finally, the City requests the court adjudicate its pending motion to dismiss, or alternatively, for summary judgment in MHC Financing Limited Partnership et al v City of San Rafael et al, C-04-3325 (MHC II), a second suit MHC filed against the City of San Rafael on August 16, 2004. See Doc #40, C-04-3325.

The court finds that MHC waived the damages it now asserts in MHC II during proceedings in MHC I (C-00-3785) when MHC waived its claims for past and future constitutional damages and proceeded to trial on its constitutional claims seeking only declaratory and injunctive relief.

Absent the waived damages, MHC II (C-04-3325) involves the same subject matter as the claims brought in MHC I (C-00-3785). Because a litigant "has no right to maintain two separate actions involving the same subject matter at the same time in the same court and against the same defendant," Barapind v Reno, 72 F Supp 2d 1132, 1145 (ED Cal 1999), the court dismisses MHC II (C-04-3325) with prejudice.

VI

In sum, the court GRANTS the City's motion for summary judgment on MHC's physical taking and exaction claims and DENIES the City's motion for all other claims. Additionally, the court GRANTS the City's motion to dismiss proceedings in case number 04-3325.

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1           The parties are DIRECTED to appear for a pretrial  
2 conference on January 9, 2007, at 9:00 am, or such other date as  
3 they mutually agree and arrange with the court's courtroom deputy,  
4 Cora Delfin, who may be reached at (415) 522-2039.

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6           IT IS SO ORDERED.

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10 VAUGHN R WALKER

11 United States District Chief Judge  
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